discrimination. For example, if an ILEC were to limit availability of a service to only those customers already purchasing it, the ILEC would be engaging in discrimination against existing customers of both the ILEC and CLEC that do not currently receive the service. Accordingly, an ILEC should be permitted to withdraw a service only if all customers receiving that service (including its own) also are required to cancel that service in the same time-frame. Moreover, if a reseller is using a service for a resold offering, ILECs should be flatly prohibited from withdrawing the service.

[¶ 175] Thus, the Commission must reject the view that a service may be withdrawn permissibly upon an ILEC's showing that competitors will have an alternative way of providing service, such as through the use of unbundled network elements. This proposal would serve only to enforce discriminatory conditions imposed by ILECs.

[¶ 177] The Commission must remain vigilant in its adoption of enforcement of resale rules. If it does not, the ILECs may engage in conduct designed to hinder competition. For example, CWI is planning its entry into the local exchange market in California through the resale of Pacific Bell's ("PacBell's) retail services. CWI has vigilantly worked with the California Public Utilities Commission (CPUC) to ensure that it has complied with all necessary regulations. Recently, CWI filed its local exchange tariff which, consistent with CPUC rules, was to become effective on five-days public notice. After the public notice period had ended, CWI contacted the CPUC and was told that the Commission had declined to take any action against the tariff. Therefore, much like the

FCC's own tariff policy, the tariffs have taken effect as a matter of law.[75] The CPUC statutory scheme, like the FCC s, does not issue Orders specifically approving tariffs, unless they were subject to suspension and investigation.

[¶ 177] PacBell, despite its obvious knowledge of the California regulatory scheme, has refused to provide CWI with the resale services contained in its tariff. Language that PacBell has inserted in its resale tariff allows it to refuse to provide service until it receives verification that CWI's tariff has been lawfully filed with the CPUC. For the time being, the CPUC has agreed to provide verbal confirmation to PacBell that a carrier's tariff is in effect. However, this requires that the new carrier engage in an effort to coordinate and follow up on communications between PacBell and CPUC staff members who (1) are typically unavailable to answer their telephones and (2) acknowledge that their work load may prevent them from providing verification of the tariff filing in a timely manner. It is precisely this type of gratuitous refusal to cooperate that requires the Commission to scrutinize the Bell

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[75] *See e.g., MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977) ("it is well recognized that the tariff provision of the Communications Act . . . embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services . . . unless and until the [FCC], after hearing, determines that such rates or practices are unlawful. . .").

Companies closely throughout the implementation of these rules, and probably for years to come.

V. PRICING OF WHOLESALE SERVICES MUST BE REASONABLE AND NONDISCRIMINATORY [¶¶ 175, 179, 180-182]

A. National Uniformity Is Needed In Pricing As Much as In Availability [¶ 180]

[¶ 180] Without national guidelines to govern the pricing of wholesale services, the availability of such services will do little to further the introduction and development of competition in the local services market. Accordingly, CWI supports the Commission's adoption of national wholesale pricing principles. Such rules will provide critical guidance to state commissions in determining avoided costs. Moreover, inconsistent state decisions in this area could inhibit entry in particular states and retard the development of nationally competitive markets.

B. Existing USOA Accounts Should Be Used as a Starting Point for Determining "Avoided Costs" [¶¶ 181-82]

[¶ 181] CWI believes that existing USOA accounts should be used as a starting point for determining "costs avoided."[76] CWI recommends that the Commission establish a set of presumptions, as discussed in the *Notice* at paragraph 181, concerning which USOA accounts, or portions of those accounts, ILECs are able to avoid. Based on these presumptions, these costs should be uniformly excluded from all ILEC wholesale rates. This approach has a number of advantages over other approaches including: (1) clear and consistent estimates of avoidable costs will be provided for all ILECs; (2) reliance on cost

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[76] 47 U.S.C. § 252(d)(3).

data that will be made publicly available on an annual basis, so it will be easy to update avoided costs every year without the need for in-depth cost studies for each LEC; (3) elimination concerns about release of proprietary information; and (4) negation of the need to allocate joint and common costs across individual services.

Avoided costs should be defined as costs that need not be incurred by ILECs when in providing telecommunications services at wholesale. Avoided costs include all marketing, billing and collection costs associated with regulated retail services, as explicitly identified in Section 252(d)(3) of the '96 Act.[77]

[¶ 181] CWI also believes that avoided costs should include an allocation of general overhead expenses and common costs. Section 252(d)(3) of the '96 Act requires wholesale rates to exclude all costs that will be avoided," if an ILEC does not provide retail services.[78] To the extent that overhead and common costs are incurred in order to support and provide the service, they should be included as costs that would be avoided if the ILEC did not provide certain services at retail. Consequently, some share of overhead and general

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[77] 47 U.S.C. § 252(d)(3). CWI believes that all the following USOA accounts should be included in the measurement of avoided costs: Product Management Expense (47 C.F.R. § 32.6611); Sales Expense (47 C.F.R. § 32.6612); Product Advertising Expense (47 C.F.R. § 32.6613); Call Completion Services (47 C.F.R. § 32.6621); Number Services (47 C.F.R. § 32.6622); Customer Services (47 C.F.R. § 32.6623); External Relations (47 C.F.R. § 32.6722); and Research and Development (47 C.F.R. § 32.6727); Large Private Branch Exchange Expenses (47 C.F R. § 32.6341); Public Telephone Terminal Equipment Expenses (47 C.F.R. § 32.6351); Property Held For Future Use Expenses (47 C.F.R. § 32.6511); Provisioning Expense (47 C F.R. § 32.6512); Depreciation Expenses—Property Held For Future Use (47 C.F.R. § 32 6562); and Intangible Amortization Expenses (47 C.F.R. § 32.6564).

[78] 47 U.S.C. § 252(d)(3).

support accounts should be included in avoided costs as well.[79] For these accounts, a reasonable proportional allocation methodology should be devised to determine the ratio of the costs assigned to wholesale and retail services. For example, if 10 percent of an ILEC's revenues were derived from wholesale services provided to resellers, then 10 percent of these accounts could be collected from those services.

[¶ 182] CWI also supports the Commission's proposal to calculate an aggregate reduction factor which would apply uniformly across ILECs and across all services.[80] Permitting the reduction factor to vary across services would not produce more cost-based or efficient wholesale rates, unless one could be certain that the allocation of common and overhead costs across every service was perfect. However, there are no accepted methods for allocating common costs across multiple services to yield efficient prices. Permitting the reduction factor to vary across services would only serve to create a massive cost study burden on the states, raise ILEC complaints about confidentiality, and severely delay the determination of wholesale rates. An aggregate reduction factor would be far simpler and more efficient to administer

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[79] A review of the USOA suggests that, at a minimum, the following accounts are general overhead expenses which should be partially excluded: Executive Expense (47 C.F.R. § 32.6711); Planning Expense (47 C.F.R. § 32.6712); Accounting and Finance (47 C.F.R. § 32.6721); Human Resources (47 C.F.R. § 32.6723); Information Management (47 C.F.R. § 32.6724); Legal (47 C.F.R. § 32.6725); Procurement (47 C.F.R. § 32.6726); Other G&A (47 C.F.R. § 32.6728); Uncollectible Notes Receivable (47 C.F.R. § 32.6790); Land and Buildings (47 C.F.R. § 32 6121); Furniture and Artworks (47 C.F.R. § 32.6122); Office Equipment (47 C.F.R. § 32.6123); and General Purpose Computers (47 C.F.R. § 32.6124).

[80] *Notice* at ¶ 182.

C. Volume and Term Requirements Are Permissible, but Not "Tying" of Elements or Services [¶ 175]

[¶ 175] Of almost equal importance to the rate levels set for wholesale services is the avoidance of discrimination in the rate structure for those offerings. Wholesale prices should not be set so as to tie offerings or special terms or conditions, to the purchase of other services or the acceptance of other limitations. "Tied" discounts based on volume, term, geography or any other factor should be presumed discriminatory unless fully justified by the ILEC.

[¶ 175] ILECs also should not be permitted to withhold the availability of wholesale services by tying them to acceptance of the entire package of other services negotiated in agreements between the ILEC and another carrier. The '96 Act precludes a "take it or leave it" approach to these agreements. Instead, an ILEC must "make available *any* interconnection, *service*, or network element provided under an agreement approved under [Section 252] to which it is a party to *any* other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[81] This language is clear: an ILEC may not limit the availability of services offered in its agreements to "similarly situated" carriers.[82] The language of the statute unequivocably allows carriers to

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[81] 47 U.S.C. § 252(i).

[82] *See Notice* ¶ 270. The obligation of Section 252(i) goes beyond the nondiscrimination obligations of Section 202. 47 U.S.C. §§ 202, 252(i). Thus, the Commission's Tariff 12 decision, which interpreted AT&T's Section 202 obligations, is inapposite. *See AT&T Communications*, 6 FCC Rcd. 7039 (concluding that AT&T must make Tariff 12 options available to "similarly situated" customers, but emphasizing that AT&T may not add "artificial constraints" to preclude others from selecting the service). In any event, in *AT&T*

(continued...)

select *any* interconnection, service, or network element contained in an agreement, and purchase only that portion, not the entire agreement. If Congress had intended to require carriers to take everything or nothing, it could have done so by requiring "the agreement" to be made available, not "any interconnection, service or network element."

[¶ 175] The ability of requesting carriers to pick and choose services offered in ILEC agreements is critical to the development of competition and is central to the spirit of the unbundling provisions of the '96 Act. Requiring each service to be made available individually will prevent collusion and discrimination between carriers. It also assures that ILECs cannot limit competition by bundling unnecessary (and unattractive) services or elements with the services requesting carriers want. Unbundled offerings, not package deals, are required by the '96 Act.[83]

D. Additional "Administrative" Costs Should Be Reasonable [¶ 179]

[¶ 179] CWI believes that the Commission should establish uniform rules to determine and provide guidance as whether any administrative charges can be included or tacked-on once wholesale rates have been determined. In all instances, these charges should

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[82](...continued)
Communications prospective customers had the ability to obtain the services negotiated for in Tariff 12 from hundreds of other carriers. There are no comparably feasible suppliers of the ILECs' services.

[83] Finally, in response to the Notice's question regarding the duration for which a service in an agreement must be made available, *Notice* at ¶ 272, CWI notes that the statute is silent on this point. CWI believes this silence indicates the service or element should be made available to any carrier for the entire period in which the agreement is effective.

be both reasonable, predictable and nondiscriminatory. For example, a charge to change a customer from one LEC to another (*e.g.*, from an ILEC to a CLEC) should not exceed the same "PIC change" charge that is imposed when customers switch from one IXC to another. Moreover, administrative costs that meet or exceed the amount of costs avoided should never be permitted. In fact, those situations where the wholesale price is raised above retail should be considered prima facie cases of noncompliance with Section 251(c)(4)(B) of the '96 Act.[84]

VI. ARBITRATION AND ENFORCEMENT PROCEDURES ALSO REQUIRE UNIFORMITY [¶¶ 264-68]

[¶¶ 264-68] CWI believes that, the Commission should establish procedures for its oversight and participation in the arbitration process pursuant to Sections 252(e)(5) and (6).[85] Although Section 252(e)(5) does not set a specified time-frame in which the Commission must adopt rules establishing such procedures, consistency with Section 251 suggests that they should become effective simultaneously with the national rules the Commission will establish under Section 251(d)(1).[86] Any delay in implementing rules governing the Commission's participation in the arbitration process could undermine the goals of the '96 Act by delaying entry by competitors into local service markets.

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[84] 47 U.S.C. 251(c)(4)(B).

[85] *Id.* § 252(e)(5) and (6).

[86] *Id.* §§ 251(d)(7), 252(e)(5).

[¶ 266] Section 252(e)(5) directs the Commission to act in cases where a state commission "fails to act or carry out its responsibility under [Section 252]."[87] This provision most likely will be triggered by the failure of a state commission to arbitrate and resolve disputes brought to it under Section 252(b)(4)(c).[88] Consistent with the terms of Section 252(b)(4)(c), CWI submits that if a state commission fails to resolve an issue brought to it under Section 252(b) within nine months from the date an ILEC receives a bona fide request for negotiation, that state commission should be deemed to have "fail[ed] to act" in the matter.

[¶ 266-67] Once such a period has transpired without action by the state commission, parties should be able to petition immediately the FCC to assume jurisdiction.[89] CWI submits that the Commission then, should use alternative dispute resolution procedures ("ADR procedures") to ensure that an arbitrated agreement is reached expeditiously.[90] In light of the failure to act that triggers Commission jurisdiction in this instance, CWI submits that the pro-competitive goals of the '96 Act are served best by the Commission's retention

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[87] 47 U.S.C. § 252(e)(5).

[88] *Id.* § 252(b)(4)(c). In light of the provisions of Section 254(d)(4) which state that if a state commission does not approve or reject a negotiated agreement within 90 days, or an arbitrated agreement within 30 days, from the time an agreement is submitted by the parties, the agreement shall be "deemed approved," 47 U.S.C. § 252(e)(4), and with the possible exception of those cases where the Commission itself assumes the role of arbitrating and resolving disputes, it does not appear that Congress intended for the Commission to play a role in approving agreements.

[89] Section 252(e)(5) requires the Commission to issue an order preempting the state's jurisdiction of that proceeding or matter. 47 U.S.C. § 252(e)(5).

[90] 47 C.F.R. § 1.18.

of jurisdiction of the matter until its final resolution. Upon reaching an FCC arbitrated agreement, the parties can then submit the agreement to the appropriate state commission under the procedures set forth in Section 252(e).[91]

VII. CONCLUSION

The Telecommunications Act of 1996 seeks to restructure one of the United States' largest, most dynamic and most important industries. Congress directed the Commission or gave the Commission the immense responsibility to interpret and implement the '96 Act to ensure that it achieves its goals and serves the public interest through the furtherance of competition on all fronts. This proceeding encompasses the three topics of central importance to the agency's fulfillment of this responsibility: interconnection, network unbundling and resale. In large measure, the Commission's efforts to implement the '96 Act will succeed or fail based on the actions taken here.

As discussed above, CWI generally supports the tentative conclusions reached in the *Notice*. For the most part, the Commission has proposed a forceful and ambitious plan to ensure that the '96 Act works as intended. Undoubtedly, some parties — whether it be state commissions concerned about their jurisdiction or ILECs claiming that they cannot or should not have to meet the proposed requirements — will contend that the *Notice* goes too far. CWI urges the Commission, at this crucial juncture, not to be swayed by politics or pleas to "split the baby in half." The Commission must follow through on its tentative plans to make local competition real by adopting national standards requiring *effective* interconnection,

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[91] 47 U.S.C. § 252(e).

unbundling and resale. With the modifications described above, the Commission should adopt the *Notice* as proposed.

Respectfully submitted,
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